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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 526

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS,

versus

A. SPATES BRADY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE M. HOFFHEIMER,
CHARLES R. WEBBER,
EUGENE S. WILLIAMS,
E. A. BOWERS,
WILLIAM C. PURNELL,
Counsel for Petitioners.

The Daily Record Co. Print, Baltimore.

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No.....

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versus

A. SPATES BRADY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, respectfully show:

I.

STATEMENT OF THE MATTER INVOLVED.

On October 17, 1932, the United States Circuit Court of Appeals for the Fourth Circuit (R. 107) affirmed a judgment of the District Court for the Northern District

of West Virginia rendered September 5, 1931, in favor of the respondent A. Spates Brady against your petitioners, The Baltimore and Ohio Railroad Company (hereinafter sometimes called the Baltimore & Ohio) and the Western Maryland Railway Company (hereinafter sometimes called the Western Maryland), for $63,048.60, with interest and costs. This does not include an attorney's fee for the respondent, all questions on which were reserved (R. 39).

The opinion of the Circuit Court of Appeals, reported as *Baltimore & O. R. Co. v. Brady,* 61 F. (2d) 242, is at page 89 of the record. A specially constituted District Court, pending this action, denied to Brady an injunction to annul that part of the Interstate Commerce Commission's order awarding him less than he claimed and recovered, the opinion being reported as *Brady v. Interstate Commerce Com.,* 43 F. (2d) 847, and this Court affirmed that decree (*Brady v. United States,* 283 U. S. 804). The District Court gave no written opinion in this action, except that refusing to sign bills of exceptions. (*Brady v. Baltimore & O. R. Co.,* 56 F. (2d) 231; R. 74). The Circuit Court of Appeals denied a writ of mandamus to require settlement and signature of bills of exceptions (*Baltimore & O. R. Co. v. Baker,* 58 F. (2d) 627), and this Court on October 3, 1932, denied a writ of certiorari to review that ruling (*Baltimore & O. R. Co. v. Baker,* No. 121, October Term, 1932). Therefore the record only presents the sufficiency of the petition, which exhibits and makes part thereof the reports and order of the Commission (R. 1, 10, 21, 31; *Brady v. Baltimore & O. R. Co.,* 112 I. C. C. 244; Id., 152 I. C. C. 327).

This action was under the Interstate Commerce Act, Secs. 8, 9, 16(1), 16(2), and 22 [USCA, Tit. 49, Ch. 1, Secs. 8, 9, 16(1), 16(2) and 22], as an election to proceed

before the Commission in the first instance, or under Secs. 13, 16(1) and 16(2) [USCA, Secs. 13, 16(1) and 16(2)] and the general decisions as to the scope and purpose of the Act, compelling resort to the Commission, such as *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, for damages for alleged undue and unreasonable disadvantage and discriminatory and unduly prejudicial practices by your petitioners, interstate carriers, in the distribution to the respondent's coal mine of coal cars for use in interstate commerce.

The respondent's petition, filed February 6, 1930 (R. 1), partly based on, and partly endeavoring to avoid, the Commission's findings and reparation order (R. 10, 21, 31), showed in substance, exclusive of the reports and order (R. 10, 21, 31), the following:

That the respondent operated a mine, during a period of car shortage, on a branch of the Baltimore & Ohio, between and adjacent to mines of the West Virginia Coal & Coke Company (hereinafter called the Coal Company), a competitor, on the same and another Baltimore & Ohio branch; that by agreement between your petitioners, effective during that period, the Western Maryland had and exercised trackage rights over the branches reaching and serving said competitive mines of the Coal Company, and had interstate rate schedules for coal therefrom. That each of said railways had in force rules and regulations governing the rating of coal mines and distribution of coal cars among the mines on their lines, which rules and regulations and certain rulings and decisions of the Commission required that during periods of shortage, available cars should be distributed pro rata among the mines in accordance with their ratings, or the orders of their operators, if less than their ratings; that they permitted the operator of any mine reached by two

railways to order 100 per cent. or less of its rating from either, or to divide the orders between the two in any way which his judgment dictated, provided the combined orders did not exceed 100 per cent. of the mine rating, and the mine was entitled to its pro rata of the available cars on the basis of such orders and to ship the coal loaded therein *via* the railroad which furnished the cars.

That as a result of said trackage agreement and rate schedules, the Coal Company's mines acquired the status of mines located on and reached by the two railroads, with the right, which it exercised, to order and receive cars from, and to ship *via,* either or both on the basis of such division of 100 per cent. of the mine ratings as its judgment dictated; that said agreement and the Western Maryland rate schedules did not name respondent's mine and he was denied the right to order and receive cars for loading from, and to ship *via,* either or both of the railways as his judgment dictated. That respondent requested your petitioners to accord his mine the status of one located on both railways, with the right, subject to the applicable rules and regulations, to order and receive cars from, and to ship *via,* either or both as his judgment dictated, but his requests were denied; that the Western Maryland, although honoring the Coal Company's orders for cars and placing them for loading, refused to honor respondent's orders, and with a single exception refused to place cars at his mine, whereupon he ordered cars, and received a reduced supply, from the Baltimore & Ohio; that "the said discriminatory acts and practices were unjust, unduly prejudicial and unlawful and in violation of the Interstate Commerce Act"; that if permitted, he would have chosen the Western Maryland and secured his entire car supply therefrom, because it had a much better supply than the Baltimore & Ohio, and would have shipped his entire output *via* the Western Maryland; and

that his loss of profits on the additional coal he would have produced and sold and his increased costs on the coal actually produced and sold aggregated $57,735.11.

The proceedings before the Commission were referred to (R. 5-7), and its two reports and order were exhibited with and made part of the petition (R. 6, 8, 10, 12, 31). As to them the petition alleged in substance that he filed with the Commission a complaint charging, among other things, that the discriminatory acts and practices in failing and refusing to serve respondent's mine with cars as therein described were in violation of the Interstate Commerce Act, and praying an award of reparation for the damages which he sustained as a result thereof. The petition alleged in substance: that after hearing and investigation the Commission, in its first exhibited report, held that "under the circumstances" the respondent should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent. of the rating of his mine as his judgment dictated, and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads; that the Commission further found and concluded in said report that the acts and practices of your petitioners resulted in undue prejudice to him; that the excess mining costs, $9,283.14, and loss of profits, $48,451.97, gave a total of $57,735.11, claimed by the respondent as his damages; and that your petitioners did not question the method or figures used by the respondent in this computation.

But the petition further averred that by the second exhibited report the Commission found that under the rule of mitigation of damages, the respondent, by accepting the offer made by your petitioners of 20 per cent. of his supply from the Baltimore & Ohio and 80 per cent. from

the Western Maryland, as he reasonably should have done, could have increased his production and reduced his loss, and that he had over-estimated the average car tonnage; that thereupon the Commission revised the computations "upon the said mitigation of loss-setoff and average loading findings" and arrived at $12,838.31 as the respondent's damages, which your petitioners were ordered to pay, with interest from April 1, 1923, amounting to $17,524.29, and entered an order accordingly; that the awarded reparation had not been paid.

The petition averred that "said mitigation of loss-setoff and average loading findings" were beyond the Commission's power, erroneous in law, null and void; that on January 17, 1930, respondent had filed in the District Court, a bill alleging "said mitigation of loss-setoff and average loading findings" to be beyond the Commission's power, without warrant in law, null and void, and praying a decree accordingly, annulling the same, and that the Court order the Commission to reopen the proceedings and to reconsider "said mitigation of loss-setoff and average loading findings," and make corrected findings and a supplemental order consistent with the order and decree of the Court (R. 8, 9).

That the respondent was entitled to judgment for said $17,524.29, in accordance with the Commission's order, and an additional sum which would bring the total to $57,735.11, with interest from April 1, 1923, and costs, including reasonable attorneys' fees.

Judgment was prayed for $57,735.11, with said interest.

The first report of the Commission, made part of and exhibited with said petition (R. 10) in substance found:

That the Western Maryland contracted with the Coal Company for 65 per cent. of its fuel needs, and obtained from the Baltimore & Ohio limited trackage rights for a maximum of 90 carloads per day from the mines of the Coal Company. That, with an apparently brief and immaterial exception, under the car distribution rules in effect during part of the period involved, as passed on by the Commission, a mine served by two roads, if it confined its orders to one road, was permitted to order 100 per cent. of its rating from that carrier; that a mine served by two cariers was not permitted to order cars in excess of 100 per cent. of its rating from both roads, but had a right to order its full rating from either if it desired and to divide its orders between the two roads as desired, provided the combined orders did not exceed 100 per cent. of its rating. That no opinion was expressed whether the Coal Company was entitled to order cars in conformity with rules for joint mines; and that except for a trivial exception, which was later adjusted and did not enter into the result, the Coal Company was restricted in combined orders to both roads to 100 per cent. of its rating. That it was agreed between your petitioners and the Coal Company that the latter's car supply would be furnished by the Western Maryland and the Baltimore & Ohio, respectively, in the proportions of 80 per cent. and 20 per cent., which division was adapted to the needs of the Coal Company based upon past shipments, and that similar consideration was not given to the respondent, who was advised that cars would be supplied by both carriers only in the proportions of 80 per cent. and 20 per cent., as with the Coal Company.

That by fixing the proportion of the Coal Company's car supply to be furnished by the respective carriers, in conformity with its customary shipments, and after consultation with it, advantages were made available to it in respect of markets, labor supply and efficient and eco-

nomical working; that like consideration was not given to respondent, but he was offered arbitrarily and without regard to the requirements of his business, that which had been arranged for his competitor after deliberation, and such service would not have been similar or on a basis of equality between shippers; that he was thereby subjected to undue and unreasonable disadvantage; that he should have been permitted to divide his car orders in such divisions of 100 per cent. of the mine rating as his judgment dictated, and cars should have been furnished accordingly in conformity with car supplies on the respective roads; and that respondent was entitled to reparation for undue prejudice.

By the second exhibited report (R. 21), insofar as material, it was found in substance that the respondent had been offered a car supply on the basis of 20 per cent. by the Baltimore & Ohio and 80 per cent. by the Western Maryland, and he refused the same; that his alleged loss was computed on an excessive tonnage per car; that under the rule that a party suffering a loss from breach of duty ought to do what a reasonable man would do to mitigate his loss, the respondent, by reasonable action in accepting the 20-80 offer, could have increased his production and diminished his loss, and to the extent of his failure to do so he could not be compensated; that for the undue prejudice respondent was damaged $12,838.31, for which, with interest, he was entitled to reparation, and your petitioners were jointly and equally responsible.

The reparation order was for $12,838.31, with interest from April 1, 1923 (R. 31).

The respondent unsuccessfully endeavored to rid himself of the reparation order by the suit in equity averred in the petition, with the result and reported as already stated.

Your petitioners demurred to the petition in the present action, generally as insufficient in law, and specially for the reasons that it was for a sum in excess of the Commission's award, and that the District Court, as a court of law, could not "consider, review, revise or reverse" the award (R. 33, 34). After the demurrers were overruled, there was a jury trial, resulting in the judgment appealed from (R. 39).

II.

QUESTIONS PRESENTED.

1. In an action at law by the shipper in the District Court, consequent on failure or refusal of the carrier to pay the amount of the Commission's reparation award, are the shipper's right of action and the Court's jurisdiction limited in maximum amount to the sum awarded by the Commission's reparation order, with interest, or can a greater amount be sued for and recovered?

2. In such an action at law following the Commission's reparation award of less than the shipper's claim, can the Court, at the instance of the shipper, adjudge that the Commission's award or findings diminishing the award in amount, were beyond the Commission's power or erroneous as a matter of law, and therefore void and without legal effect, and adjudge a recovery greater than the sum awarded by the reparation order, with interest?

3. Is it lawful and within the power of the Commission, in a report or an order of reparation, to find that the shipper has not complied with the rule that it is the duty of a party suffering loss to do what a reasonable man would, to mitigate his loss, and to apply that rule in diminution of the shipper's claim, and in its findings and order to refuse recovery of the amount by which the shipper could so have mitigated his loss?

4. In such an action at law can the Court, at the instance of the shipper, adjudge that the amount of the Commission's findings and award diminished by the Commision's finding that the shipper could have mitigated his loss by application of the rule as to mitigation of loss stated in the preceding Question 3, was beyond the Commission's power or erroneous as a matter of law, and therefore void and without legal effect, and adjudge a recovery of damages undiminished by such mitigation of loss?

5. In such an action at law is it material in respect of the amount recoverable, whether or not the proceedings before the Commission involved an administrative question, and so were compulsory on the shipper, or whether or not the shipper could have sued without first proceeding before the Commission, rendering the proceedings before the Commission voluntary; and if material, were the proceedings before the Commission administrative and a compulsory condition precedent to the suit?

6. In such an action at law can the Court, at the instance of the shipper, permit recovery of damages for alleged discrimination, where he was tendered the same proportions of car supply as his competitor was given, where, to allow the complaining shipper the proportions demanded by him, would in fact have accorded him an undue preference?

III.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided important questions of Federal law, which have not been, but should be, decided by this Court.

(a) In relation to the above Questions 1 to 4, both inclusive, this Court has never decided, that by rejection in whole or in part, the Commission's findings denying reparation or disappointing his expectation as to amount, or because of the carrier's failure or refusal to pay the amount awarded, the shipper, by action at law for a greater amount, can obtain a so-called "court review" or a judicial reversal or annulment of the findings and order as beyond, or in abuse of its power, or contrary to law, and so obtain a greater recovery.

(b) In relation to Questions 1 to 5, both inclusive, this Court has never decided that under the Interstate Commerce Act, Section 16(2), the Court can adjudge recovery of an amount greater than the amount of the Commission's award, whether the proceeding before the Commission was voluntarily elective under Sections 8, 9, 16(1), 16(2) and 22, or administrative and compulsory under those sections and Section 13, and the general decisions defining the scope and purposes of the Act and the administrative powers and discretion of the Commission.

(c) This Court has never decided whether or not in an action at law, following the failure or refusal of a carrier to pay the amount of the Commission's reparation order, the order, to the extent of its diminution or partial rejection of the shipper's claim, was an unreviewable negative order.

It is important to shippers and carriers that these questions be determined; and that it be determined whether in a judicial contest, for the protection of the public's, as well as the carrier's, interest, by diminution of its expenditures, the carrier throws everything to the hazard and gambles on the result by waiver of the limit of the award.

This Court has never given or sustained such a review or a recovery greater than the Commission's award, with interest; nor held that a reparation award less than that claimed is, as to the diminution, other than an unreviewable negative order; nor held that the measure of recoverable damages is different before the Commission than in the Court. In the limitation of the recoverable damages to the amount awarded by the Commission, the public has an interest which the carrier cannot lawfully waive.

2. The Circuit Court of Appeals has decided questions in a way probably in conflict with applicable decisions of this Court.

(a) In relation to the above Questions 1 to 4, both inclusive, even if the precise questions are undecided by this Court, the decision of the Circuit Court of Appeals is probably in conflict with the decisions of this Court, or the principles to be extracted from them.

(b) In relation to Question 5, there is a clear conflict with the applicable decisions of this Court holding an attack before the Commission, not on the carriers' rule or practice, but on the alleged unequal application, or the alleged violation or discriminatory enforcement, (here the apportionment on the basis of Western Maryland, 80 per cent., and Balti-

more & Ohio, 20 per cent.), of the rule or practice, does not involve an administative question; and that in the latter instance the Commission proceeding or reparation order is not a condition precedent to suit in the District Court.

3. The Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals.

(a) In relation to the above Questions 1 to 4, both inclusive, it is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Chicago, B. & Q. R. Co. v. Feintuch,* 191 Fed. 482, 486, the Circuit Court of Appeals for the Third Circuit in *Western New York & P. R. Co. v. Penn Refining Co.,* 137 Fed. 343, 353, and the Circuit Court of Appeals for the Seventh Circuit in *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154, certiorari denied, *Bartlesville Zinc Co. v. Mills,* No. 66, Oct. Term, 1932, as well as with the decision of the Court of Appeals of the District of Columbia in *Southern Transp. Co. v. Interstate Commerce Com.,* 47 F. (2d) 411.

A certified transcript of the record accompanies this petition.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 3283, The Baltimore and Ohio Railroad Company, a corporation, and Western Maryland Railway

Company, a corporation, Appellants, v. A. Spates Brady, Appellee, that the said judgment of said United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
WESTERN MARYLAND RAILWAY COMPANY,
Petitioners.

GEORGE M. HOFFHEIMER,
CHARLES R. WEBBER,
EUGENE S. WILLIAMS,
E. A. BOWERS.
WILLIAM C. PURNELL,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS,

versus

A. SPATES BRADY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The District Court rendered no written opinion. The opinion of the Circuit Court of Appeals, reported as *Baltimore & O. R. Co. v. Brady*, 61 F. (2d) 242, is at page 89 of the record. The relevant Interstate Commerce Commission reports are reported as *Brady v. Baltimore & O. R. Co.*, 112 I. C. C. 244; 152 I. C. C. 327; (R. 10, 21). A specially constituted District Court, pending this action, denied to Brady, respondent herein, an injunction to annul that part of the Commission's order awarding him less than he claimed and recovered, the opinion being reported as *Brady v. Interstate Commerce Com.*, 43 F. (2d) 847, and this Court affirmed that decree, *Brady v.*

United States, 283 U. S. 804. There were opinions refusing to sign (*Brady v. Baltimore & O. R. Co.,* 56 F. (2d) 231; R. 71), and refusing a mandamus to compel signature of, bills of exceptions (*Baltimore & O. R. Co. v. Baker,* 58 F. (2d) 627; certiorari denied, *Baltimore & O. R. Co. v. Baker,* No. 121, October Term, 1932).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered October 17, 1932 (R. 107). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (USCA, Tit. 28, Ch. 9, Sec. 347). (See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.,* 284 U. S. 370; *Southern R. Co. v. Eagle Cotton Oil Co.,* 284 U. S. 675; *Lewis-Simas-Jones Co. v. Southern Pac. Co.,* 283 U. S. 654).

STATEMENT.

The principal facts have been set forth in the petition, pages 1 to 9, and in the interest of brevity are not repeated here. The relevant parts of the important statutes are set out in an appendix.

ERRORS ASSIGNED.

All of the errors assigned in the Specification of Errors hereinafter are intended to be urged. In the Circuit Court of Appeals (R. 89), they were embraced by Assignments of Error Nos. 1 and 61 (R. 40, 63; *Slacum v. Pomery,* 6 Cranch, 221, 223, 225; *Teal v. Walker,* 111 U. S. 242, 246; *Nalle v. Oyster,* 230 U. S. 165, 176; *Denver County Com'rs. v. Home Sav. Bank,* 236 U. S. 101. reversing *Board of Commissioners v. Home Sav. Bank,* 200 Fed. 28, 32; *Fleischmann Constr. Co. v. United States,* 270 U. S. 349, 355, 356).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that in an action at law by the shipper in the District Court consequent on failure or refusal of the carrier to pay the amount of the Commission's reparation award, the shipper's right of action and the Court's jurisdiction were not limited in maximum amount to the sum awarded by the Commission's reparation order, with interest, and that a greater amount could be sued for and recovered.

2. The Circuit Court of Appeals erred in holding that in such an action at law in the District Court after the Commission's reparation award of less than the shipper claimed, the District Court, at the instance of the shipper, could adjudge that the Commission's award or findings diminishing the award in amount, were beyond the Commission's power or erroneous as a matter of law and therefore void and without legal effect, and could therefore adjudge a recovery greater than the amount awarded by the reparation order, with interest.

3. The Circuit Court of Appeals erred in holding that it was not lawful or within the power of the Commission in its reports and order of reparation to find that the shipper had not complied with the rule that it is the duty of a party suffering loss to do what a reasonable man would to mitigate his loss, and to apply that rule in diminution of the shipper's claim, and in its findings and order to refuse recovery of the amount by which the shipper could so have mitigated his loss.

4. The Circuit Court of Appeals erred in holding that it was not lawful and within the power of the Commission to find in its reports and order of reparation that the failure or refusal of the shipper to accept 20 per cent. of his car supply from The Baltimore and Ohio Rail-

road Company and 80 per cent. from the Western Maryland Railway Company did not comply with the rule that it is the duty of a party suffering loss to do what a reasonable man would to mitigate his loss, and in its findings and order of reparation to apply that rule in diminution of the shipper's claim.

5. The Circuit Court of Appeals erred in holding that in such an action at law by the shipper, the Commission's finding that his loss could have been mitigated by acceptance of his car supply in the proportions offered by the carriers and the order diminishing the reparation to that extent, were beyond the Commission's power or erroneous as a matter of law, and therefore void and without legal effect, and that the District Court could so adjudge and grant a recovery of damages undiminished by such mitigation.

6. The Circuit Court of Appeals erred in holding that the proceeding before the Commission involved an attack on a rule or practice of the carriers as to the car supply from each, and therefore an administrative question, and that the proceeding before the Commission was compulsory and a condition precedent to suit in the District Court; and in not holding that the attack was on an unequal application or a violation or discriminatory enforcement of the car supply rule, for which the shipper could have sued without proceeding before the Commission, rendering that proceeding elective and voluntary.

7. The Circuit Court of Appeals erred in declining to hold that the refusal of petitioners to give respondent more cars than 80 per cent. Western Maryland and 20 per cent. Baltimore & Ohio resulted in no discrimination against respondent and no damage to him.

SUMMARY OF ARGUMENT.

I.

The shipper's right of action and the District Court's jurisdiction were limited in maximum amount to the sum awarded by the Interstate Commerce Commission's reparation order with interest, and the District Court could not grant recovery of a greater amount.

1. This Court has never directly decided the precise question above stated, as to the limitation of recovery by the amount of the reparation order, with interest, but the decision of the Circuit Court of Appeals is probably in conflict with the underlying principles and the language of applicable decisions of this Court as to Section 16(2) of the Interstate Commerce Act, and is in conflict with decisions of two other Circuit Courts of Appeals.

2. This Court has never sustained a recovery in excess of the award with accrued interest, whether or not the proceeding before the Commission was voluntary or elective, or administrative and compulsory.

3. This Court has not held that a reparation order less in amount than the sum claimed, is, as to the disallowance, other than an unreviewable negative order. The implication of the decisions has been that such an order, as to the amount disallowed, is negative and unreviewable.

4. This point that the amount of the reparation order, with interest, is the limit, is not foreclosed by the decisions as to the scope of Section 16(2).

5. The "full contestation" is the shipper's right to sustain the award by extrinsic evidence, and the carriers'

right to overcome it by evidence showing that the Commission was wrong.

6. The carrier does not and cannot throw everything to the hazard and gamble on the result in contesting the Commission's award. The analogies are against the lower Court's construction of Section 16(2). A carrier cannot lawfully waive or be estopped against anything falling within the purview of the Act. There is a public interest in a carrier's expenditures and in the prevention of preferences and discrimination.

7. The penalty for unsuccessfully contesting the Commission's award is payment of the shipper's attorney's fees and court costs.

II.

The shipper's petition in the District Court showed that the Commission reached the amount of the order of reparation by disallowing the sum by which the loss would have been minimized or avoided if he had accepted the offered proportions of car supply. The petition attacked the disallowance and sought its elimination, without which the verdict and judgment could not have been reached. Therefore the petition was insufficient to support the judgment. This is apart from the fact that the Commission's reports, including its findings and its order, were exhibited with and made part of the shipper's petition in the District Court.

1. The respondent's petition showed that the verdict and judgment included the damages denied by the Commission because of failure of the respondent to do what a reasonable man would have done to avoid, minimize or mitigate his damages by accepting the apportionment of the car supply offered by the carriers.

2. That petition exhibited and made part thereof the Commission's reports and reparation order. It cannot now be dismembered to eliminate the reports and order. A pleading must be taken most strongly against the party pleading.

3. The measure of damages in a reparation proceeding before the Commission and in a court is the same.

4. Both before the Commission and in the court, it is the duty of a party injured by breach of contract or tort to avoid, minimize or mitigate his damages by doing what a reasonable man would do.

5. The rule of avoidance, minimization or mitigation of damages does not constitute a so-called "loss-setoff," involving two findings, but is a rule that the damages assessable are only those which are the direct or natural consequence of the breach of contract or tort, and that damages, to the extent that they could have been avoided, minimized or mitigated, resulted from the act or neglect of the plaintiff and not of the defendant.

6. The duty of minimization or mitigation is not changed by the fact that it can only be obtained by acceptance of goods or services from the party in default.

III.

There was no administrative question requiring the respondent to proceed before the Commission for reparation. The limitation of recovery to the amount of the reparation order resulted from his own voluntary election of remedies. If there was an administrative question compelling procedure before the Commission, he pursued a right created by statute, coupled with a statutory remedy which was exclusive, and was subject to the

limitation imposed by the statute. The Commission did not sustain the shipper on, or even decide, the administrative question, if any. By unsuccessfully raising an administrative question he could not evade the limitation of recovery to the amount of the reparation order.

1. Respondent voluntarily elected to proceed before the Commission for reparation, when he could have sued in court in the first instance. The limitation of the recovery to the amount of the reparation order is the result of his voluntary election.

2. If the Commission's reports be eliminated, the petition is left in the state of alleging that the Commission found that the respondent had been unjustly discriminated against in not having been allowed to divide his car orders as his judgment dictated, without stating how or why the Commission reached that conclusion. Under the rule that a pleading must be taken most strongly against the pleader, it cannot be presumed that the question presented to the Commission was administrative.

3. Unless unpleaded facts are presumed in favor of the petition standing alone, and more strongly if the exhibited orders are read as part of the petition, under the accepted test of an administrative or non-administrative question, the matter before the Commission was not whether the carriers' rules and regulations were unreasonable or discriminatory but whether the carriers violated them or enforced them in a discriminatory way, and was not administrative.

4. If there was an administrative question compelling respondent to go before the Commission, he pursued a new right created by the statute, coupled with a provision for a special statutory remedy and subject to the

limitations which the statute prescribed, one of which was the limitation of the recoverable amount by Section 16(2) to the sum awarded by the Commission, with interest.

5. If the respondent's complaint before the Commission raised an administrative question, he did not sustain that proposition and the Commission did not decide the case on that basis. The Commission's decision was really that because, in fact, the Coal Company had been allowed to divide its car requisitions in accordance with its own judgment, based on its own business requirements, respondent was entitled to divide his requisitions in accordance with his own business requirements as his judgment interpreted them; and that in failing to proceed in that way there was unjust discrimination against respondent. If, therefore, respondent raised before the Commission an administrative question, he was unsuccessful on that point and he could not, by raising a question as to which he was unsuccessful, evade in court the limitation to the amount of the reparation order under Section 16(2).

IV.

There was no res adjudicata in Brady v. Interstate Commerce Commission, 43 F. (2d) 847, and *Brady v. United States,* 283 U. S. 804.

1. *Res adjudicata* was not pleaded by respondent.

2. The *Brady Case,* above cited, was dismissed for want of jurisdiction. The statements of the statutory District Court as to the administrative character of the question and the recoverable amount were *obiter dicta.*

3. The reasons of this Court for the affirmance in *Brady v. United States, supra,* can only be inferred from the citations in the memorandum opinion. It is thought that a proper interpretation shows that the decree was affirmed on the grounds (1) that the Commission's order minimizing the recovery was negative as to the amount disallowed, and (2) that even if the question of discrimination was an administrative question as claimed by the respondent, there could be no review of the facts found by the Commission in respect of the administrative question. The memorandum opinion does not show that this Court regarded an administrative question to have been present or decided by the Commission. The citations demonstrate that this Court did not pass upon the question whether Section 16(2) limited recovery in court to the amount of the reparation order.

4. The general expressions in the opinion in *Brady v. Interstate Commerce Commission, supra,* not essential to dispose of that case, do not control or determine the effect of the decree in the present case.

V.

The respondent not only was limited in recovery by the amount of the Commission's award, but suffered no discrimination or recoverable damages.

There was no discrimination against respondent, for he was offered the same car service that was given his competitor. To have permitted him to receive a higher percentage from the better car supply of the Western Maryland than was given his competitor would have resulted in unlawful discrimination in his favor. That being true the petition, when read with the exhibited reports showed that the respondent had no right of action.

ARGUMENT.

I.

THE SHIPPER'S RIGHT OF ACTION AND THE DISTRICT COURT'S JURISDICTION WERE LIMITED IN MAXIMUM AMOUNT TO THE SUM AWARDED BY THE INTERSTATE COMMERCE COMMISSION'S REPARATION ORDER WITH INTEREST, AND THE DISTRICT COURT COULD NOT GRANT RECOVERY OF A GREATER AMOUNT.

This Court has never directly decided the precise question whether or not the amount of the reparation order limited the amount of recovery in the District Court. But the decision of the Circuit Court of Appeals is probably in conflict with the underlying principle and the language of applicable decisions of this Court, and is plainly in conflict with decisions of other Circuit Courts of Appeals.

By Section 16(2) it is enacted that, "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file * * * a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises."

This Court has not decided that a shipper can sue for, or that the District Court can adjudge recovery of, an amount greater than the Commission's award, whether the proceeding before the Commission was voluntarily elective under Sections 8, 9 and 22, or administrative and compulsory under those sections and Section 13 and the general decisions such as *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, defining the scope and purpose of the Act and the administrative powers and discretion of the Commission.

In no case has this Court sustained a recovery in excess of the Commission's award with accrued interest (*Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 422; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434; *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 476; *Southern Pac. R. Co. v. Darnell-Taenzer Lbr. Co.*, 245 U. S. 531, 533; *Pennsylvania R. Co. v. Minds*, 250 U. S. 368; *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 86, 90; *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, 239).

In *Standard Oil Co. v. United States*, 283 U. S. 235, 240, laying aside the absence of jurisdiction to "enjoin, set aside, annul or suspend, in whole or in part," "purely negative orders," and the holding that the courts do not review the Commission's decision on an administrative question, in the absence of suggestion that it had acted arbitrarily or without evidence or had transcended its constitutional or statutory powers, it was decided that the petition for a direction to the Commission to grant the prayer of the complaint before it was only "a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission;" and was "nothing less than an attempt to avoid the statute by indirection." Speaking of Section 9, evasion of which was not permitted in order to enable the shipper to obtain more than the nothing given by the Commission, it was said:

> "Section 9 of the Interstate Commerce Act * * * provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants 'shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.' Having elected

> to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure."

In *Chicago, B. & Q. R. Co. v. Feintuch,* 191 Fed. 482, 486, and *Western New York & P. R. Co. v. Penn Ref. Co.,* 137 Fed. 343, 363, the Circuit Courts of Appeals of the Ninth and Third Circuits flatly held that there could be no recovery beyond the amount awarded by the Commission.

"A course of precedents and judicial proceedings in Courts of Justice make the law" (*Wilkes v. The King,* Wilmott, 322, 330; *Gordon v. Ogden,* 3 Pet. 33, 34; *Illinois Central R. Co. v. Turrill,* 110 U. S. 301, 304), and the general acquiescence by the profession, in suing for no more than the amount of the reparation order (except in the unsuccessful attempts in *Standard Oil Co. v. United States,* and *Brady v. United States, supra,* and except the course pursued in *Pennsylvania R. Co. v. Clark Brothers Coal Min. Co.,* 238 U. S. 456, 472, where the additional claim for discrimination in car distribution had never been brought before the Commission, and need not have been brought there), are cogent proof that no more than the amount of the Commission's award could be sued for. If there is no direct decision of this Court, it has been because, "the clearer a thing is, the more difficult it is to find any express authority or any dictum exactly in point" (*Keighley v. Durant,* (1901) A. C. 240; *Panama & S. P. Tel. Co. v. India Rubber, &c., Works Co.,* (1875) L. R. 10 Ch. 526). The absence of previous decision is good reason for granting the review herein applied for and deciding it now.

Nor has this Court held that a reparation order less in amount than the sum claimed is, as to the diminution, other than an unreviewable negative order (*Standard Oil Co. v. United States,* 283 U. S. 235, 238; *Brady v. United States,* 283 U. S. 804. See *Chicago, B. & Q. R. Co. v. Feintuch,* 191 Fed. 482, 486; *Western New York & P. R. Co. v. Penn Ref. Co.,* 137 Fed. 343, 353; *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154, certiarori denied, *Bartlesville Zinc Co. v. Mills,* No. 66, Oct. Term, 1932; *Southern Transp. Co. v. Interstate Commerce Com.,* 47 F. (2d) 411; *Manufacturers' R. Co. v. United States,* 246 U. S. 457, 482, 483; *Alton R. Co. v. United States,* 58 F. (2d) 399, 402; *Powers v. Cady,* 9 F. (2d) 458, 462, 463). The implication of the decisions has been that such an order as to the amount disallowed, is negative and unreviewable.

By the plain language of Section 16(2) suit can be brought by the shipper only if the carrier refuses to pay. Therefore, if the carrier pays or tenders the amount, however small, of the reparation awarded by the Commission there can be no suit.

This point that the amount of the reparation order, with interest, is the limit, is not foreclosed by the language of *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 422, and the cases following it. The statement in those cases that Section 16 of the Act, "only establishes a rebuttable presumption," "cuts off *no defense,* interposes no obstacle to a full contestation of all the issues and takes no question of fact from either court or jury," and "at most, therefore, it is merely a rule of evidence" and "does not abridge the right of trial by jury or take away any of its incidents," proves no more than this,—that, whether the shipper has gone before the Commission by voluntary election, or compulsorily because he has had to pursue *a statutory right by a statutory remedy with its*

limitations, the carrier, haled before the Commission involuntarily, is entitled to a jury trial and can still invoke all defenses. It is true that, while the Commission's findings and order are prima facie evidence, the complaining shipper may adduce additional evidence; but that is only additional evidence to support the findings and order and to overcome the carrier's evidence combatting them. But the prima facie character of the evidence, allowance of all defenses and right to contest all issues, does not disprove that *the Commission's order has the further function of limiting the amount which can be sued for or recovered*. As to that it is binding.

In *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291, although assumed that the shipper had unnecessarily obtained a reparation order from the Commission, it was said that the rule of damages before the Commission "could hardly be different from that proper for the" Court. As to the reparation award, it was said of Section 16:

> "*By the same section, if the carrier does not comply in due time with the order, the complainant may sue in a state court,—which implies that if the order has been complied with and the money paid no suit can be maintained.* It is to be noticed further that reparation before answer is contemplated as possible by Section 13, and in that case the carrier shall be relieved of liability to the complainant, though only, of course, for the particular violation of law. The decisions say that whatever the damages were, they could be recovered (*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 202, 203; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 429); and that *the statute determines the extent of damages* (*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472). We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out

of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid." (Italics ours).

In *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 471, where the case had been before the Commission under claim that the carrier's rule was unreasonable, it was held that the shipper was governed by the Federal statute in the measure of damages, and could not, in advance of an award by the Commission, proceed for treble damages under the State statute. It was said that the shipper, having invoked the Federal right,—

> "It was not possible for the plaintiff to ignore the statute it had thus called into play, and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.
>
> "This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in Section 16 of the act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practised, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal act."

All the cases show that the "full contestation" is no more than a right of the shipper to sustain the Commission's award by extrinsic evidence, and a right of the carrier to overcome it by evidence showing that the Commission was wrong.

In *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430, it was said:

> "This provision only establishes a rebuttable presumption. It cuts off *no defense*, interposes no obstacle to a *full contestation of all the issues*, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents." (Italics ours).

The right of "contestation of all issues" is thus shown to be a right which "cuts off *no defense.*"

In *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 482, it was said:

> "The statutory provision merely established a rule of evidence. It leaves every opportunity *to the defendant to contest* the claim." (Italics ours).

In *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 131, it was said:

> "And the fact that a reparation order has at most only the effect of prima facie evidence * * *, being open to *contradiction by the carrier* when sued for recovery of the amount awarded, is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted." (Italics ours).

In *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 258, this Court said:

> "They [the Commission's orders] are quasi judicial and only prima facie correct in so far as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, *the carrier* is, by Section 16 of the act, given its day in court and the right to a judicial hearing." (Italics ours).

And in *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 90, it was said:

> "These cases [*Meeker and Mills Cases*] have disposed of the question of the right *of the defendant* to attack the prima facie value of the award, and have dealt with the nature of the award of the Commission, in view of the statutory provisions as to its character." (Italics ours).

In *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472, previously quoted, the implication is similar.

If the Commission awards nothing, likewise there can be no suit. The carrier has nothing to pay or tender and therefore does not refuse to pay. The Commission's refusal of reparation is only an unreviewable negative order, and the order or the carrier's omission to pay what has not been ordered, cannot be circumvented, as shown by the *Standard Oil Co. Case*, 283 U. S. 235, 237, 238, in which all reparation was refused and there was denial of an injunction against dismissal by the Commission of complaints to recover damages for overcharges, and to compel the Commission to grant the complainant's prayer, a finding of overcharge and, if necessary, a further hearing to determine the amount.

In the instance of this very reparation order, *Brady v. United States,* 283 U. S. 804, affirming the decree of dismissal of *Brady v. Interstate Commerce Com.,* 43 F. (2d) 847, in a memorandum opinion, the citation of the *Standard Oil Co. Case,* evinced the view that as to the diminution by the Commission of the damages the reparation order was negative and unreviewable.

In *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154, certiorari denied, *Bartlesville Zinc Co. v. Mills,* No. 66, Oct. Term, 1932, a mandamus to compel an award was refused; and *Southern Transp. Co. v. Interstate Commerce Com.,* 47 F. (2d) 411, a mandatory injunction to compel the Commission to vacate a dismissal was denied.

An award for a given amount is a refusal of more, and, as to the excess, the award is negative and cannot be reviewed. (*Standard Oil Co. v. United States, supra; Bartlesville Zinc Co. v. Mellon, supra,* certiorari denied *Bartlesville Zinc Co. v. Mills, supra; Southern Transp. Co. v. Interstate Commerce Com., supra.* See *Manufacturers' R. Co. v. United States,* 246 U. S. 457, 482, 483; *Alton R. Co. v. United States,* 58 F. (2d) 399, 402; *Powers v. Cady,* 9 F. (2d) 458, 462, 463).

The view of the Court below was, in effect, that the carrier, by refusing to pay, waives the limit of the reparation order, throws everything to the hazard and gambles on the result in contesting the Commission's award. It is too often forgotten that when the public regulates the railroads, it also regulates itself. The analogies are against the lower Court's construction of Section 16(2). A carrier cannot lawfully waive, or be estopped against, anything falling within the purview of the Act, because there is a public interest in the carrier's expenditures and in the prevention of preferences and discrimination

in respect of rates and service and limitation upon claims and suits against it. Examples are the inability to waive a bill of lading limitation of time of notice of claims or suit (*A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667; *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 197; *Leigh Ellis & Co. v. Davis*, 260 U. S. 682), or a statutory limitation as to time of suit (*Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133), or to waive tariff rates or terms of service (*Southern R. Co. v. Prescott*, 240 U. S. 632, 638); or to be estopped against collection of the full legal tariff rate (*Chesapeake & O. R. Co. v. Martin*, 283 U. S. 209, 222).

To subject the carrier refusing to pay a reparation order to the risk of throwing off the limit would penalize and discourage resort to the jury trial which the statute contemplates. It would also permit the discrimination which the whole Act intends to prevent, by discarding the limit in favor of the shipper who sues, and insisting on it by payment to the others. Section 8 of the Act sufficiently penalizes the carrier for exercising his right of contest to a jury trial, by rendering it liable for "a reasonable counsel or attorney's fee, to be fixed by the Court in every case of recovery." The carrier is also liable for the recovering shipper's "costs in the case."

II.

THE SHIPPER'S PETITION IN THE DISTRICT COURT SHOWED THAT THE COMMISSION REACHED THE AMOUNT OF THE ORDER OF REPARATION BY DISALLOWING THE SUM BY WHICH THE LOSS WOULD HAVE BEEN MINIMIZED OR AVOIDED IF HE HAD ACCEPTED THE OFFERED PROPORTIONS OF CAR SUPPLY. THE PETITION ATTACKED THE DISALLOWANCE, AND SOUGHT ITS ELIMINATION, WITHOUT WHICH THE VERDICT AND JUDGMENT COULD NOT HAVE BEEN REACHED. THEREFORE THE PETITION WAS INSUFFICIENT TO SUPPORT THE JUDGMENT. THIS IS APART FROM THE FACT THAT THE COMMISSION'S REPORTS, INCLUDING ITS FINDINGS AND ORDER, WERE EXHIBITED WITH AND MADE PART OF THE SHIPPER'S PETITION.

Respondent's petition in the District Court averred that the "increased cost of mining and selling the coal actually produced and sold, aggregated the sum of $57,735.11" (R. 5), but complained that, although the Commission in the first exhibited report found that the shipper claimed that his excess mining costs were $9,283.14 and his lost profits $48,451.97, a total of said $57,735.11, as to the computation of which, it was said, your petitioners did not question the method or figures used, the Commission, under the "rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss," found that by reasonable action in accepting the carriers' "20-80 offer" the respondent could have increased his production, "and to this extent his damage was due to his own action and the defendants cannot reasonably be expected to compensate him therefor" (R. 7). There was also an averment that the Commission found that the tonnage which respondent could have produced, if he had been allowed the Western Maryland car supply, was based on an excessive loading tonnage per car (R. 7). It was further alleged that the Commission, by the second exhibited report "made revised mathematical computa-

tions based upon the said mitigation of loss-setoff and average loading findings, and arrived at $12,838.31 as the amount of respondent's damages and entered a reparation order dated February 28, 1929, directing the carriers to pay respondent said $12,838.31, with interest from April 1, 1923, to wit, $4,685.98, or a total of $17,524.29," which was unpaid (R. 7). The petition attacked what it termed "the said mitigation of loss-setoff and average loading findings," not on the ground that they were not established facts, but as beyond the Commission's power, erroneous in law and void; and alleged the pendency of its bill in equity attacking "the said mitigation of loss-setoff and average loading findings" (*Brady v. Interstate Commerce Com.*, 43 F. (2d) 847). The respondent claimed recovery of judgment for the $17,524.29, with interest from May 1, 1929, and such additional sum as, when added thereto with interest from the same date, would make a total of said $57,735.11, with interest on the total from April 1, 1923. The prayer was for judgment for said $57,735.11, with said interest (R. 8, 9).

The verdict was for $63,048.60 (R. 38), and the judgment was for the same amount, with interest from August 7, 1931 (R. 39).

The Circuit Court of Appeals, regarding the amount of the reparation order not to limit the recovery, gave no heed to the inclusion of the $9,238.14 for excessive car tonnage, because it thought that evidence not before the Court in the absence of bills of exceptions, might have warranted the restoration of the amount deducted by the Commission for excess mining costs. The Court, however, considered and held improper the so-called "mitigation of loss set-off" because of failure to accept the car supply offered by the two carriers (R. 98). But, after raising *sua sponte* the question whether the reports

were really part of the petition, it considered them (R. 97, 98).

What has been said shows that the question of minimization or mitigation of damages appeared on the face of the petition; that the Commission made the disallowances; that the verdict and judgment could not have been arrived at without inclusion of at least the greater part of the damages which could have been avoided by acceptance of the offered car supply; and that therefore the petition does not support the judgment, and the judgment is erroneous.

It has been held that "the coincidence of the amount as awarded" by the Commission "and the amount ascertained by the use of percentages" in incorrect tables, made it "almost mathematically certain that the result" before the Commission "could have been reached in no other way" than on the basis of the erroneous tables, and that the District Court erred against the carrier in refusing a charge correcting the error (*Pennsylvania R. Co. v. Jacoby,* 242 U. S. 89, 99). After reversal and retrial this Court again adverted to "the coincidence of percentage and award," and held that "the conclusion is inescapable that the Commission in determining the sum awarded, used percentages which had the basis of placing the plaintiff on a basis of equality with the favored companies." But as the judgment was only for the sum awarded by the Commission with interest, and there was testimony tending to show damages in at least the amount of the award, there was no prejudicial error (*Pennsylvania R. Co. v. Weber,* 257 U. S. 85, 86, 91). The amount of the verdict and judgment in the instant case, unattainable except by inclusion of the amount which the Commission had disallowed as resulting from refusal to ac-

cept the offered car supply, renders the conclusion inescapable that the judgment included this amount.

Further, although the Act, Section 16(2) required the findings and order of the Commission to be filed and constituted them prima facie evidence of the facts therein stated, the respondent went further and exhibited the reports and order with, and made them part of, the petition (R. 6, 7, 8), thereby requiring your petitioners to plead thereto, which they did. The petition cannot now be dismembered by rejection of the reports and order. Both at common law and in equity a pleading must be taken most strongly against the party pleading (4 *Encyc. Pl. & Pr.*, 759, 762; *United States v. Linn*, 1 How. 104, 110; *Dougherty v. Catlett*, 129 Ill. 431; *Bowker v. Torrey*, 211 Mass. 282; *Schuler v. Southern Iron & S. Co.*, 77 N. J. Eq. 60; *DuPont v. Gardiner*, 238 Fed. 755, 758).

The measure of damages in a reparation proceeding before the Commission and in a court are the same. In *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 290, it was said:

> "By Section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of damages sustained in consequence' of the violation * * *. By Section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by Section 16".

To the same effect are: *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472; *Pennsylvania R.*

Co. v. International Coal M. Co., 230 U. S. 184, 204; *George A. Hormel & Co. v. Chicago, M. & St. P. R. Co.*, 283 Fed. 915, 918, 919; *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156. Similarly, in *Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133, and *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 667, it was held that under Section 16 the provision limiting the filing of complaints for recovery of damages with the Commission to two years applied equally to a suit in court; that "to have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the various states, where a suit was brought * * *; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others,—would be to prefer some and discriminate against others" and that "the Railroad Company, therefore, was bound to claim the benefit of the limitation of Section 16 when sued in the Federal Court."

The rule applies, therefore, both before the Commission and in the court, that it is the duty of a party injured by breach of contract or by tort to avoid, minimize or mitigate his damages by doing what a reasonable man would do. (*The Baltimore*, 8 Wall. 377; *Warren v. Stoddart*, 105 U. S. 224, 229; *United States v. United States F. & G. Co.*, 236 U. S. 512, 526; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 489; *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 30, 31; 1 *Sutherland, Damages* (4 Ed.), Secs. 88-90, 155; 1 *Sedgwick, Damages* (9 Ed.), Secs. 201, 202, 214-215.)

The odd conception of the respondent that the rule diminishing recoverable damages to the extent to which the complaining party might reasonably have avoided, minimized or mitigated damages, involves two findings, (1) the full amount of damages which would have accrued

in the absence of the duty of minimization; and (2) the amount of avoidance, minimization or mitigation which would have resulted from reasonable effort, and that there is a so-called "loss-setoff" (R. 7, 8, 9), is without foundation. It is merely an attempt to show an initial finding of loss, increasing the debit side of the reparation order, so as to increase the limit of recovery in court. There are never two such separate findings. The finding or assessment of damages is merely the net amount of the direct or natural consequences of the breach of contract or tort. A plaintiff cannot recover unreasonable enhancement of damages, or damages due to his failure to exercise reasonable care and diligence to avoid them, since the damages resulting from his voluntary act or his neglect to exercise reasonable effort to limit the injury and prevent damages are attributable to him and not to the defendant. (*Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26; 8 R. C. L. 442; 1 *Sedgwick, Damages* (9 Ed.), Secs. 201, 202, 205.)

The thought of the Circuit Court of Appeals that "it is unthinkable that a party in default should escape liability for damages by attempting to force the other party to accept part performance as a condition to any performance at all", is groundless. A minimization or mitigation, is none the worse, nor the duty to make it less, because it can be obtained only by acceptance of goods or services from the party in default.

In *Warren v. Stoddart*, 105 U. S. 224, 229, it was held that a book canvasser, who claimed to have been entitled to the books from the publisher on credit, but who was refused the credit, should have paid the publisher cash for the books required to fill his orders, or have allowed the publisher to fill the orders and divide the profits on equitable terms, and that the law required him to take

that course by which he could secure himself with the least damage to the publisher. The case is authority that acceptance of delivery on different terms so as to minimize damages is required and does not waive a right of action for breach of the contract.

In *Lawrence v. Porter,* 63 Fed. 62, 66 (C. C. A. 6), Judges Lurton and Taft, held that where the plaintiff, the only dealer able to furnish the particular kind of lumber, violated the contract to furnish it on credit, and thereafter immediately offered to deliver for cash, the plaintiff was not justified in refusing to accept that offer. It was said:

> "The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage. *Warren v. Stoddart,* 105 U. S 224; *Deere v. Lewis,* 51 Ill. 254."

See, also, *Deere v. Lewis,* 51 Ill. 254; *Heilbroner v. Hancock,* 33 Tex. 714; *Hodges v. Fries,* 34 Fla. 63; *Huntington Easy Payment Co. v. Parsons,* 62 W. Va. 26.

III.

THERE WAS NO ADMINISTRATIVE QUESTION REQUIRING THE RESPONDENT TO PROCEED BEFORE THE COMMISSION FOR REPARATION. THE LIMITATION OF RECOVERY TO THE AMOUNT OF THE REPARATION ORDER RESULTED FROM HIS OWN VOLUNTARY ELECTION OF REMEDIES. IF THERE WAS AN ADMINISTRATIVE QUESTION COMPELLING PROCEDURE BEFORE THE COMMISSION, HE PURSUED A RIGHT CREATED BY STATUTE, COUPLED WITH A STATUTORY REMEDY WHICH WAS EXCLUSIVE, AND WAS SUBJECT TO THE LIMITATION IMPOSED BY THE STATUTE. THE COMMISSION DID NOT SUSTAIN HIM ON, OR EVEN DECIDE, THE ADMINISTRATIVE QUESTION IF ANY. BY UNSUCCESSFULLY RAISING AN ADMINISTRATIVE QUESTION HE COULD NOT EVADE THE LIMITATION OF RECOVERY TO THE AMOUNT OF THE REPARATION ORDER.

The Circuit Court of Appeals considered that the respondent attacked before the Commission a rule or practice of the carriers, and not merely the discriminatory enforcement of a rule; that the Commission was called upon to prescribe the standard of service which should have prevailed and that its administrative powers were invoked; that, therefore, the respondent was compelled to proceed before the Commission in order to obtain a finding of discrimination, which the Court deemed an administrative question; that by the time the decision had been obtained the statutory period for suit, except as preceded by a reparation order, had expired; and that this situation reinforced the view that the amount of the reparation order did not limit the sum recoverable by suit. (*Baltimore & O. R. Co. v. Brady*, 61 F. (2d) 242, 246-249; R. 97, 104).

The petition herein, pages 3 to 6, sets forth the substance of respondent's petition in the District Court and the two exhibited Commission reports made part thereof. We have already argued that the reports were part of said petition. But if the reports be eliminated, the petition is left in the state of alleging that the Commission found that respondent had been unjustly discriminated against, in that he should have been allowed to divide his car orders in such divisions of 100 per cent. of his mine rating as his judgment dictated, and that cars should have been accordingly furnished, without stating how or why the Commission reached that conclusion. Under the rule previously stated, that a pleading must be taken most strongly against the party pleading, nothing can be presumed in favor of the petition, nor can it be presumed that the question presented to the Commission was administrative.

Likewise, in *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 128, it was said:

> "It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court; and that the Federal tribunals have exclusive jurisdiction of a certain class of cases referred to in section 9 has been recognized in the few decisions dealing with the question."

See, also, *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 200. Cf. *Blumenstock Bros. etc. Agency v. Curtis Publishing Co.*, 252 U. S. 436, 441; *South Covington etc. R. Co. v. Newport*, 259 U. S. 97, 99.

Unless unpleaded facts are presumed in favor of the petition standing alone, and more strongly, if the exhibited orders are read as part of that petition, under the accepted test of an administrative or non-administrative question the matter before the Commission was not whether the carriers' rules and regulations were unreasonable or discriminatory, but whether the carriers violated their own rules and regulations or enforced them in a discriminatory way.

The rule in car distribution cases is stated in *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 282, where, summarizing *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 131, 132, it was said that upon a review of Sections 8, 9 and 22 it had been held:

> "That in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair

> or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the Federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction without previous application to the Interstate Commerce Commission."

See, also, *Pennsylvania R. Co. v. Sonman Shaft C. Co.*, 242 U. S. 120, 124; *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456; *Pennsylvania R. Co. v. Stineman Coal Min. Co.*, 242 U. S. 298; *Midland Valley R. Co. v. Barkley*, 276 U. S. 482, 484; *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304.

Mitchell Coal & C. Co. v. Pennsylvania R. Co., 230 U. S. 247, 258, shows that it was "extremely doubtful whether, at common law", the shipper had a right of action because of discrimination. And see *Interstate Commerce Com. v. Baltimore & Ohio R. Co.*, 145 U. S. 263. But in the *Mitchell Coal & C. Co. Case*, at page 258, it was said, "But if any such right existed it was abrogated or forbidden by the commerce act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as unjust discrimination, or as an undue

preference." While it was added that orders finding an allowance unreasonable and operating as an unjust discrimination or undue preference, so far as administrative, are conclusive, they are quasi judicial and only prima facie correct in so far as they determined the fact and amount of the damage,—"as to which, since it involves the payment of money and taking of property, *the carrier* is, by Section 16 of the act given a day in court and the right to a judicial hearing." (Italics ours.) This decision is plain that a new statutory right was created, coupled with an exclusive statutory remedy, which as to amount was limited by the reparation order.

See, also, *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 128; *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 200.

But if there was an administrative question compelling him to go before the Commission for a finding of undue preference or unjust discrimination and/or an order of reparation, respondent pursued a new right, created by the statute, which provided for a special statutory remedy, subject to the limitations and conditions which the statute prescribed. One of the conditions of the remedy was the limitation of the recoverable amount by Section 16(2) to the sum awarded by the Commission, with interest.

"Where a statute creates a new right, coupled with a provision for a special remedy, that remedy and that alone must be employed." The remedial provision is exclusive. (*Barnett v. Muncie National Bank*, 98 U. S. 555; *Fourth National Bank v. Francklyn*, 120 U. S. 747, 756; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165, 175.)

In *Pennsylvania R. Co. v. Clark Bros. Coal M. Co.*, 238 U. S. 456, 472, it was said in answer to the contention of the Mining Company that it could have sued in the first instance without going before the Commission:

> "But when, as a result of its own insistence upon its Federal right under the act, it appeared that the act had been violated and that the special remedial provisions of the act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play, and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.
>
> * * * * * *
>
> "It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practised, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal act."

See *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 131.

Still proceeding on the unjustified theory that respondent's complaint before the Commission raised an administrative question, he did not sustain that proposition and the Commission did not decide the case on that basis. It

held the question whether or not the Coal Company (and inferentially whether or not respondent) was entitled to a joint mine status was negligible, and it was left undecided. The Commission's decision really went off on the proposition that because, in fact, the Coal Company had been allowed to divide its car requisitions in accordance with its own judgment, based on its own business requirements, which happened to be Western Maryland, 80 per cent. and Baltimore & Ohio, 20 per cent., therefore, respondent was entitled to divide his requisitions in accordance with his own business requirements as his own judgment interpreted them, and that in failing previously to proceed in that way there had been unjust discrimination against respondent.

If, therefore, respondent did, by his complaint before the Commission, raise an administrative question, he was unsuccessful on that point, because the Commission rejected it. In *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 258 U. S. 377, 383, it was held:

> "For, while it is true that a plaintiff by his first pleading determines what right he will sue on, and that the defenses, set up either anticipatorily by him or in due course by the defendant, cannot affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. * * * The district court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission."

In *Armour & Co. v. Fort Morgan S. S. Co.*, 270 U. S. 253, 259, it was similarly said:

> "Jurisdiction in admiralty cannot be effectively acquired by concealing for a time the facts which establish that it does not exist."

It follows that, by unsuccessfully claiming before the Commission the existence of an administrative question and emerging with a favorable decision on a non-administrative ground, respondent could not in that way evade,—even if success before the Commission on the administrative question would have evaded—, the limitation in court to the amount of the reparation order.

As will be shown in a subsequent section, it does not appear that the appeal was decided on the ground that the question was administrative or that the limit of recovery was not fixed by Section 16(2).

IV.

THE ISSUES INVOLVED ARE NOT RES ADJUDICATA BY REASON OF BRADY V. INTERSTATE COMMERCE COMMISSION, 43 F. (2D) 847, AND BRADY V. UNITED STATES, 283 U. S. 804.

Although never pleaded, we anticipate repetition here of the respondent's argument below, that it was decided in *Brady v. Interstate Commerce Com.*, 43 F. (2d) 847, and in *Brady v. United States*, 283 U. S. 804, that an administrative question was involved, and that the Commission's order of reparation did not limit the recovery in court. That case was dismissed for want of jurisdiction, and the statements in the opinion of the Circuit Court of Appeals as to the administrative character of the question and the amount of recovery were mere *obiter dicta*. The reasons of this Court for the affirmance in *Brady v. United States*, 283 U. S. 804, can only be inferred from the citations. It is thought that a proper interpretation of the citations shows that the decree of dismissal was affirmed on the grounds (1) that the Commission's order minimizing the recovery was negative as to the amount disallowed, and (2) that even if the question of discrimination decided by the Commission was an administrative question, as claimed by the present respondent, then appel-

lant, there could be no review of the facts found by the Commission in respect of the administrative question. The memorandum opinion does not show that this Court regarded an administrative question actually to have been present or decided by the Commission. The omission of citation of *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, and the similar cases in this Court, so much relied on by the statutory District Court, demonstrates that this Court did not pass upon the question whether Section 16(2) limited recovery in the District Court to the amount of the reparation order.

The dicta in *Brady v. Interstate Commerce Commission*, supra, cannot control the decree of dismissal.

In *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291, it was said:

> "Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.
>
> "This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohen v. Virginia*, 6 Wheat. 399; *Carroll v. Carroll's Lessees*, 16 How. 279."

In *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 460, it was said:

> "The determination of the questions now raised under the Clayton Act was not essential to the former decision. The defendants in their argument seize upon isolated passages in the opinion of the court in the former case, and contend that they are decisive here. But the effect of the former judgment as an estoppel is not to be thus determined. *Vicksburg v. Henson*, 231 U. S. 259, 269, and cases therein cited."

See, also, *Russell v. Place,* 94 U. S. 606; *Cromwell v. Sac County,* 94 U. S. 351; *Southern Pac. R. Co. v. United States,* 168 U. S. 1.

V.

THE RESPONDENT NOT ONLY WAS LIMITED IN RECOVERY BY THE AMOUNT OF THE COMMISSION'S AWARD, BUT SUFFERED NO DISCRIMINATION OR RECOVERABLE DAMAGES.

The petition in the District Court alleged a finding by the Commission that the Commission had recognized that the Coal Company had a joint mine status, and that it accorded to the Coal Company the right to order 100 per cent. of its car requirements in the proportions which its own judgment dictated. It also alleged that the Commission had found that the respondent was entitled to, but had been refused, 100 per cent. of his car requirements divided in the proportions which his judgment dictated, and that the respondent had been unjustly discriminated against. By the reports made part of the petition, however, it appeared that the Commission did not decide that either the Coal Company or the respondent was entitled to a joint mine status, but did decide that the Coal Company had been accorded 100 per cent., apportioned on the basis of Baltimore & Ohio 20 per cent. and Western Maryland 80 per cent., which, based on past shipments, was in accordance with the Coal Company's requirements, and that by reason thereof the respondent was entitled to 100 per cent. divided as his judgment dictated, in conformity with the available supplies on both railroads.

The petition, however, artfully concealed what was disclosed by the first exhibited report,—that the Western Maryland's trackage rights were occasioned by the fact that the Coal Company was under contract with the Western Maryland to furnish it with 65 per cent. of its own fuel, and that the allocation of cars for general com-

mercial purposes was merely incidental or subsidiary to the Western Maryland fuel contract. It did not appear that Brady had any fuel contract with the Western Maryland. The Interstate Commerce Act does not prohibit preference or discrimination, but only undue preference or unjust discrimination.

The petition, with the exhibited reports, therefore, does not show that the allocation of 20 per cent. by the Baltimore & Ohio and 80 per cent. by the Western Maryland was an undue preference to the Coal Company or an unjust discrimination against the respondent. On the contrary, it is clear from the petition and reports that car service on the basis of 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore & Ohio was relatively as advantageous and valuable to respondent as to the Coal Company, and that if the respondent had been permitted to do what he professed to be his desire and purpose, he would have ordered his whole car supply from the Western Maryland, which he alleged to have a better supply in the aggregate than the Baltimore & Ohio, as a result of which he would have obtained an advantage over the Coal Company, which was tied down to an allotment of 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore & Ohio; and that the allotment of equal percentages to respondent did him full justice.

Reading the reports as part of the petition it shows that respondent received treatment equal to that of the Coal Company and, therefore, suffered no damages, and that he was not only properly limited to the amount of reparation awarded by the reparation order but, in fact, was entitled to no damages.

That being true, the petition, when read with the exhibited reports, showed that the respondent had no right

of action whatever, and the petition was inconsistent with and failed to support the judgment.

Upon the grounds stated in the petition and this brief we respectfully ask that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

RELEVANT PARTS OF IMPORTANT STATUTES.

Interstate Commerce Act, Sec. 8, USCA, Tit. 49, Ch. 1, Sec. 8; 24 Stat. 382:

> "8. Liability in damages to persons injured by violation of law.—In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, Sec. 9; USCA, Tit. 49, Ch. 1, Sec. 9; 24 Stat. 382:

> "9. Remedies of persons damaged; election; witnesses.—Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

Interstate Commerce Act, Sec. 13; USCA, Tit. 49, Ch. 1, Sec. 13; 24 Stat. 383; 36 Stat. 550; 41 Stat. 484:

"13. Complaints to and investigations by commission.—(1) *Complaint to commission of violation of law by carrier; reparation; investigation.*—Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Interstate Commerce Act, Sec. 16; USCA, Tit. 49, Ch. 1, Sec. 16; 24 Stat. 384; 25 Stat. 859; 34 Stat. 590; 36 Stat. 554, 1167; 38 Stat. 219, 41 Stat. 491, 492; 43 Stat. 633:

"16. Orders of commission and enforcement thereof; forfeitures.—(1) *Orders by commission for payment of damages.*—If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) *Proceedings in courts to enforce orders; costs; attorney's fee.*—If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

Interstate Commerce Act, Sec. 22; USCA, Tit. 49, Ch. 1, Sec. 22; 24 Stat. 387; 25 Stat. 862; 28 Stat. 643; 42 Stat. 827:

"* * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."